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In the Supreme Court of the United States.

THE UNITED STATES, APPELLANT,
v.
L. P. & J. A. SMITH.
No. 253.

APPEALED FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal by the Government from a judgment of the Court of Claims awarding claimants the sum of $119,304.27. One item of the recovery represents compensation in the amount of $111,585.97 allowed for work done in connection with, but outside and extra of, a contract between the parties for dredging in Detroit River. The other item in- in cluded the recovery, i. e., $7,718.30, represents the loss alleged to have been sustained by reason of delays in the performance of the work.

PETITION.

In substance the petition sets forth that on December 31, 1892, claimants entered into a contract with the United States through O. M. Poe, colonel, Corps of Engineers, United States Army, whereby

claimants undertook to dredge from section eight of the area of a proposed ship channel, in the shallows of and connecting the waters of the Great Lakes between Duluth, Chicago, and Buffalo, materials known as sand, gravel, clay, and bowlders. The said contract was on the 19th day of January, 1893, approved by Thomas Lincoln Casey, brigadier general, Chief of Engineers.

That in the year 1894 while working under said contract a natural bed of limestone rock was discovered to exist within the boundaries of the area specified in said contract, which material was not the material claimant had by said contract undertaken to remove. That, thereupon, a supplemental contract was entered into between the parties for the removal of said newly discovered material.

That after the completion of the supplemental contract aforesaid claimant resumed work under the first contract at such points as directed, when George J. Lydecker, lieutenant colonel, Corps of Engineers, United States Army, who had succeeded Col. O. M. Poe, on his death in 1896, and who was in charge of said operations for the United States, ordered claimant to remove from the area of section eight of said channel limestone bed rock; that claimant protested being compelled to remove said material and demanded that an extra price be fixed for doing such additional work; that notwithstanding the protest made claimant was forced by said George J. Lydecker, lieutenant colonel, Corps of Engineers, United States Army, engineer in charge of said work

for the United States, to remove said bed rock under penalty of being declared a defaulting contractor by the engineer in charge.

That notwithstanding your petitioner was ordered by said engineer in charge of said work not to remove bed rock if found above grade in said section eight, but only sand, clay, gravel, and bowlders, your petitioner was nevertheless compelled by said engineer in charge to remove limestone bed rock from said eighth section in the year 1897, in the following amounts and figures, to wit: (Petition, Rec. 3–4.)

That by reason of delays in the prosecution of said work caused by the officers and agents of the United States claimant sustained a further certain loss.

The original contract was made a part of the petition and marked Exhibit A thereto.

Its provisions which are material in the presentation of the questions involved on this appeal are as follows:

SPECIFICATIONS.

33. *The decision of the Engineer's officer in charge as to quality and quantity shall be final.* [Italics ours.] (Rec. 9.)

37. INSPECTION.—*The order of the work will be determined by the U. S. agent in charge, and his instructions shall be observed by the contractor and his employees.* When required by the U. S. agent in charge, the contractor shall, without additional compensation, furnish all necessary labor, materials and ap-

pliances for placing and replacing suitable stakes and buoys for use in making surveys for estimates, and for marking the channel. He shall also, without additional compensation, furnish the use of a tug when needed for towing the sounding rafts or scows, conveying engineers, inspectors, and other employees of the United States, and generally for all purposes connected with the inspection and supervision of the work. When required by the U. S. Engineer in charge, all agents or inspectors of the United States employed on or about the work shall have meals and sleeping accommodations furnished by the contractor at a reasonable price, approved by the U. S. Engineer in charge, and paid for by the United States.

All plant used shall be kept in good working condition. Each scow used shall be marked with a distinctive name or number, and whenever practicable it shall be loaded to its full capacity. Loads on deck scows or lighters will be measured separately, and partial loads in dump-scows will be estimated, by the inspector, and his measurements and estimates, if approved by the Engineer officer in charge, shall be final.

If any person employed by the contractor on any portion of the work shall appear to be incompetent or objectionable, he shall be discharged immediately upon the request of the U. S. agent in charge, and such person shall not again be employed upon any portion of the work.

In case of differences arising between the U. S. agent in charge and the contractor in regard to the work or to the specifications, appeal may be made to the Engineer Officer in charge. [Italics ours.] (Rec. 10.)

91. MATERIAL.—*The material to be removed consists of clay, sand, gravel, and boulders, all in unknown proportions.* [Italics ours.] (Rec. 18.)

ARTICLES OF AGREEMENT.

All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as does not conform to the specifications set forth in this contract shall be rejected. *The decision of the Engineer Officer in charge as to quality and quantity shall be final.*

* * * * *

If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor, legally appointed, shall have power, *with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part,* and, upon the giving of such notice, all money or reserved percentage due

or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States. (Rec. 22.) [Italics ours.]

If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quality, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: *Provided,* That no payment shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon

by the contracting parties and approved by the Chief of Engineers. (Rec. 23.) [Italics ours.]

This contract shall be subject to approval of the Chief of Engineers, U. S. A. (Rec. 24.)

Upon the motion of appellant this case was remanded for additional findings.

The original and additional findings which are pertinent will be here set out.

FINDING VI.

On February 10, 1897, the plaintiffs were informed by Col. Lydecker, Corps of Engineers, United States Army, who was then in charge of the work being done by the plaintiffs under the contract of December 31, 1892, that their contract was extended to July 1, 1897, and was extended from time to time by the defendants for the completion of the work. In that year Col. Lydecker ordered the plaintiffs to work at particular spots toward the northerly end of section 8, on what was known, respectively, as Upper Rock Shoal, Middle Rock Shoal, Hackett Rock Shoal, Lower Rock Shoal, and to do work on the Bar Point Rock Shoal, which had been excavated under the contract of November 9, 1894, with the L. P. and J. A. Smith Company. The material or a large part of the material to be removed from these points were limestone rock and limestone bedrock. The plaintiffs protested against excavating and removing limestone rock and limestone bedrock, and asked for the fixing of an extra price for doing this work. The defendants refused to fix any other price than that called for by the

contract. The defendants insisted that all the material to be removed from the points above enumerated was clay, sand, gravel, and boulders, and told the plaintiffs that if they did not remove the same the plaintiffs would be declared defaulting contractors; that the work would be taken from them; that the work would be done and the same charged to the plaintiffs; and that it would be paid for from the retained percentages in defendants' hands due the plaintiffs for work already performed under their contract, and if said percentages were not sufficient to pay for the work, the plaintiffs and their bondsmen would be proceeded against. (Rec. 39.)

FINDING VII.

A large part of the material which the engineer officer in charge arbitrarily stated to be clay, gravel, sand, and boulders was in fact limestone rock and limestone bedrock, and was not the material which was specified in the contract, and which the plaintiffs had to remove under the terms of the contract.

The quantity of material excavated by the plaintiffs from June 25, 1897, to October 17, 1897, was 33,332 cubic yards, 10 per cent of which was clay, sand, gravel, and boulders, leaving 29,998 cubic yards of limestone bedrock. From this latter quantity there is to be deducted 1,250 cubic yards, the amount excavated below grade, leaving 28,748 cubic yards of limestone rock and limestone bedrock. Of this latter quantity about 12,990 cubic yards was limestone bedrock and 15,758 cubic yards was limestone rock.

A reasonable price for removing the 12,990 cubic yards of limestone bedrock was $6.22\frac{1}{2}$ per cubic yard, which would amount to the sum of $80,862.75. A reasonable price for removing the 15,758 cubic yards of limestone rock was $2.24 per cubic yard, which would amount to $35,297.92. These two sums amount to the sum of $116,160.67. The contract price for removing clay, sand, gravel, and boulders was 18 cents per cubic yard; 3,333 cubic yards of this material at 18 cents added to $116,160.67 makes the sum of $116,760.61. From this sum must be deducted the sum of $5,174.64, being the 18 cents per cubic yard paid the plaintiffs on the 28,748 cubic yards removed by them from June 25, 1897, to October 19, 1897, leaving due the plaintiffs by the defendants the sum of $111,585.97, which sum remains unpaid. (Rec. 40.)

FINDING VIII.

From June 25 to October 19, 1897, the defendant insisted upon locating for the plaintiffs the points where dredging was to be done, and the plaintiffs were compelled to wait upon the defendants for instructions before they could proceed with their dredging. As a result, the plaintiffs being without authority to continue the work, lost time while waiting for the defendants to locate their work. The time lost during this period, from June 25 to October 19, 1897, was 385 hours and 55 minutes, and the time so lost caused a loss to the plaintiffs of $7,718.30. (Rec. 4.)

ADDITIONAL FINDINGS OF FACT.

I.

No officer or officers of the United States other than Col. George J. Lydecker insisted that all the material or materials to be removed from Upper Rock Shoal, Lower Rock Shoal, Middle Rock Shoal, Hackett Rock Shoal and Bar Rock Shoal was clay, sand, gravel, and bowlders.

II.

No other officer or officers of the United States than Col. George J. Lydecker told L. P. and J. A. Smith that if they did not remove material, which material was not in fact the material specified under the contract, then they would be declared defaulting contractors; that the work would be taken from them; that the same would be done and charged to them, and that it would be paid for from retained percentages in the hands of the defendant due them for work already performed under their contract.

III.

Charles Y. Dixon, assistant United States engineer, Harry Hodgman, United States engineer, subinspector, and Col. George J. Lydecker, Corps of Engineers, United States Army, in charge of the work being done by plaintiffs from June 25 to October 19, 1897, insisted upon locating for L. P. and J. A. Smith the points where dredging was to be done.

ASSIGNMENT OF ERRORS.

It is submitted that the court erred in the following particulars:

1. In concluding from the facts found that there was a violation of any duty under the contract on the part of the United States.

2. In misapplying the law to the facts as found.

3. In holding that under the facts as found it had jurisdiction to award a judgment in favor of claimant

BRIEF OF ARGUMENT.

1. The work performed for which an allowance of $111,585.97 was made was not work provided for or required by the terms of the contract, but was extra and outside of the contract.

2. No obligation to pay for extra work was created because the provisions of the contract relating to the procurement of, and the payment for, extra work were not complied with, and there was not a waiver of such provisions.

3. There was no breach of warranty by the United States relating to a matter material and necessary to the performance of the contract.

4. The petition does not allege neither has the court found that bad faith on the part of an officer of the United States in the exercise of the powers conferred upon such officer produced the injury of which claimants complain, and as compensation for which the sum of $111,585.97 was allowed.

5. That it does not appear from the findings that the award of the sum of $7,718.30 as compensation for time lost by claimant was founded on a breach of contract by the United States or the exercise of fraud or bad faith by an officer of the United States in the exercise of delegated powers.

I.

Argument relating to award for extra work.

Under the facts as found the Court of Claims allowed a recovery for the removal of materials not provided for and not required by the terms of the contract. The contract provided for the removal of "clay, sand, gravel, and boulders" at the price of 18 cents per cubic yard. The Court in its award has made an allowance for the removal of limestone rock at the rate of $2.24 per cubic yard, and limestone bed rock at the rate of $6.22½ per cubic yard.

In view of the provisions of the contract, the allegations of the petition of claimant and the facts as found by the Court of Claims we may safely proceed upon the theory that the allowance of $111,585.97 was for work outside and extra of the contract.

But the contract provides that:

> No claim shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished, under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the part of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers. (Rec. 23.)

The petition does not allege that there was such a a writing. The Court does not find as a fact that there was such a writing. Furthermore, a recovery could not be had based upon such a writing unless the same was pleaded.

Whenever the contract covering the improvement to be made contains provisions relating to change of project and claims for extra work which are in effect the same as the provisions in the contract between the parties here, then in the event such provisions have not been complied with payment for extra work performed can be secured only in the following cases:

(*a*) When such provisions have been waived by an agent having the power to waive the same. (*Barlow* v. *U. S.*, 184 U. S. 123.)

(*b*) When there has been a breach of warranty by the Government relating to a matter necessary to be done in the performance of the contract by reason of which breach the extra work is required to be performed. (*Christie* v. *U. S.*, 237 U. S. 234.)

(*c*) When the extra work is made necessary or procured through the fraud or bad faith of an agent of the Government in the exercise of expressly delegated powers. (*Ripley* v. *U. S.*, 223 U. S. 695.)

It follows, therefore, that if claimant is entitled to recover compensation for the performance of extra work claimants' case must come within at least one of the principles announced in the cases cited.

NO WAIVER OF PROVISIONS.

The contract was made subject to the approval of the Chief of Engineers. No waiver of its provision

could have been made except by the Chief of Engineers.

Haukins v. *U. S.*, 96 U. S. 689.
Barlow v. *U. S.*, 184 U. S. 123.
Plumley v. *U. S.*, 222 U. S. 545.

To prevent the possible inference from the facts as originally found that the Chief of Engineers had procured the performance of the extra work, appellant made its motion that this case be remanded for additional findings of fact, which was granted. From the additional facts as found it clearly appears that whatever extra work was performed at the request or upon the order of an agent of the United States that the same was performed upon the request or order of Col. George J. Lydecker, Engineer officer in charge.

In view of the facts as found it cannot be successfully urged that the Chief of Engineers waived the provisions of the contract. He alone had the authority to waive the same.

BREACH OF WARRANTY.

It does not appear from the facts as found that a breach of warranty on the part of the Government made the extra work necessary. The petition does not so allege. Such a claim has not been made.

BAD FAITH.

Appellant's motion that this case be remanded for additional findings of fact has served a further good purpose, in that counsel for appellee in the brief in opposition to such motion has stated in very clear language the theory upon which a recovery for the performance of the extra work was allowed.

In view of the relevancy of said statements to the point now to be discussed they are here set out.

> The sole and only question involved in this case was whether or not the materials dredged by the plaintiff should have been classified as sand, clay, gravel, and boulders, or should have been classified as limestone and limestone bedrock. During the progress of the work the United States Engineer officer in charge, Col. Lydecker, insisted on arbitrarily and erroneously classifying *all* material as sand, clay, gravel, and boulders, and therefore within the contract, but plaintiff contended that the same was limestone and limestone bedrock and not covered by the contract, and demanded that an extra price and a new contract be made therefor, all of which was refused by the defendant, relying on that clause of the contract which reads as follows:
>
> The decision of the Engineer officer in charge as to quality and quantity shall be final.
>
> The Court of Claims has found it to be a fact that the plaintiff's contention was correct; that the Engineer officer in charge of the work was erroneous in his classification; that the classification was arbitrary and unwarranted and made in the face of incontrovertible evidence. It thus clearly appears that the question of a change of project or extra work thereunder which invokes the question of authority of the United States Engineer officer in charge to create an obligation on the part of the United States is not involved in this case, and the defendant's assumption to the

> contrary is based wholly upon a misconception of the facts as disclosed in the record and as found by the Court of Claims.
>
> * * * * *
>
> The Court of Claims having found that the United States Engineer officer in charge acted arbitrarily, erroneously, without full knowledge of the facts and regardless of the facts in the classification of the materials dredged, the plaintiffs were entitled to the reasonable value of their services in removing the limestone and limestone bedrock on a quantum meruit basis.
>
> (Appellee's brief in opposition to appellant's motion for an order on the court to make and certify additional findings of fact (pp. 4–5).)

The only objection that is found with the statement above quoted is that the Court of Claims did not find the facts as they are therein stated.

The court states the facts in the following language:

> A large part of the material which the engineer officer in charge arbitrarily stated to be clay, gravel, sand, and bowlders was in fact limestone rock and limestone bed rock, and was not the material which was specified in the contract, and which the plaintiff had to remove under the terms of the contract. (Finding VII, R. 40.)

It is true that the Court of Claims in its memorandum stated that "the defendants insisted in the face of incontrovertible evidence that the material which they required the plaintiffs to excavate and remove was the material described in the specifications,

etc." (Rec. 41.) But this court has repeatedly held that the facts necessary to support a recovery must appear in the findings of fact; that the opinion of the court can not supply such an omission.

The court's attention is particularly invited to the utter absence of an explicit finding by the Court of Claims that there was fraud or bad faith exercised by Col. George J. Lydecker in passing judgment on the quality and quantity of material dredged.

The only expression by the Court of Claims that could under any construction suggest the practice of fraud or bad faith is found in the following statement:

VII.

> A large part of the material which the engineer officer in charge arbitrarily stated to be clay, gravel, sand, and bowlders was in fact limestone rock and limestone bedrock and was not the material which was specified in the contract, and which the plaintiffs had to remove under the terms of the contract. (Rec. 40.)

And the only word in said statement that could be so construed as to suggest fraud or bad faith is the word "arbitrarily."

But a statement made arbitrarily is not a statement made fraudulently or in bad faith. If so an arbitrary officer is a dishonest officer. This is not true of course.

This court in the case of *Ripley* v. *U. S.*, 220 U. S. 491, had before it for determination the significance of a statement from which it was contended that

fraud and bad faith on the part of an officer had been found as a fact.

In that case his honor Chief Justice White in his opinion remanding the case says:

> We are of opinion, however, that while it may be open to conjecture that the word "manifest" as used by the court in its finding is susceptible of the broad significance which the argument thus imputes to it, we do not think such meaning is so clear and free from doubt as to justify us in concluding that there was bad faith on the part of the Government inspector in charge of the work. We say this because it is certain that we may not draw the inference of bad faith unless the findings are so clear on the subject as to cause such inference to be plain beyond controversy. It follows, therefore, that the finding below on the subject of the knowledge and bad faith of the inspector is so incomplete and inconclusive as to render it impossible for us to decide the cause without grave risk of doing wrong to the plaintiff or serious injury to the Government (l. c. 495–6).

This case was remanded for additional finding.

When the case was again before this Court, *Ripley* v. *U. S.*, 222 U. S. 144, the question whether there was fraud or bad faith was again presented for the consideration of the Court. Whereupon the case was again remanded for additional findings. The case came back to this Court, *Ripley* v. *U. S.*, 223 U. S., 695 whereupon it was decided that the Court of

Claims had finally made a definite finding of fraud in the use of the following language (l. c. 700).

> 2. The refusal of said assistant engineer, as inspector in immediate charge of the work, to allow crest blocks to be laid when he knew that parts of the core had settled and consolidated as aforesaid was gross error and an act of bad faith on his part.

FRAUD OR BAD FAITH NOT PLEADED.

If appellant's position, that the findings do not show fraud, is well taken, then it is contended that the case should not be remanded for additional findings for the reason that the claimant has not alleged bad faith or fraud and therefore the subject of fraud is not a proper subject of a finding.

No rule of pleading is more firmly established than the rule that fraud and bad faith, if to be the basis of a recovery, must be specifically pleaded.

> *New Albany* v. *Burke*, 11 Wall. 96, l. c. 106.
> *Kent* v. *Lake Superior Iron Co.*, 144 U. S. 75, l. c. 91.
> *Evers* v. *Watson*, 156 U. S. 228, l. c. 237.
> *Fogg* v. *Blair*, 139 U. S. 118, l. c. 127.

Although the rules of pleading in the Court of Claims are liberal, the recovery can be had only on the case set forth in the petition. The Government is entitled to know what constitutes the basis of claimant's cause of action and should not be required to defend a cause of action which is not set out in the petition.

The petition herein does not allege that Col. Lydecker abused the power conferred under the contract to pass judgment on the quality and quantity of the material. Nowhere in the petition is there to be found even an inference of fraud or bad faith.

On this point the attention of the court is especially invited to the case of the *United States* v. *Gleason*, 175 U. S. 588, appealed from the Court of Claims, wherein it is held that there must be an allegation and proof of bad faith. The court in the opinion says:

> The fallacy, as we think, in the position of the court below was in assuming that it was competent to go back of the judgment of the engineer, and to revise his action by the views of the court. *This, we have seen, could only be done upon allegation and proof of bad faith, or of mistake or negligence so great, so gross, as to justify an inference of bad faith. But in this case we find neither allegation nor proof.* The only allegation in the petition which can be pointed to bearing on this subject is as follows: "That on or about December, 1888, the said Maj. Amos Stickney refused to plaintiffs the extension of time which they requested, and to which they were rightfully entitled under the contract, by reason of being prevented from completing the same within the time limited by the last extension and renewal thereof, by freshets and by force and violence of the elements and by no fault of their own, and by reason of damages and hindrances from causes within the control of the United States; and the plaintiffs were thereby prevented from completing the work. And the plaintiffs aver

and charge that the said refusal of the said Stickney to extend the time for the completion of the contract was wrongful and unjust, and a breach of the contract."

In other words, the plaintiffs allege that they were prevented from completing their work by force and violence of the elements and not by any fault of their own, and that the judgment of the engineer in refusing an extension was therefore wrongful and unjust. But as they had agreed, in the contract as we have construed it, that the engineer was to decide whether the failure to complete was due to the force of the elements or to their fault, their allegation now is that the determination of the engineer was wrongful and unjust, because he decided the submitted issue against them. *Of course such an allegation was wholly insufficient on which to base an attempt to upset the judgment of the engineer.* (l. c. 607.) [Italics ours.]

* * * * *

Without protracting the discussion, our conclusions are that, under a proper construction of the contracts in this case, the right or privilege of the contractors, if they failed to complete their work within the time limited, to have a further extension or extensions of time, depended upon the judgment of the engineer in charge when applied to to grant such extension and *that no allegation or finding is shown in this record sufficient to justify the court in setting aside the judgment of the engineer as having been rendered in bad faith, or in any dishonest disregard of the rights of the contracting parties.* (l. c. 608.) [Italics ours.]

It is submitted, therefore, that the Court of Claims has not found fraud or bad faith, and that this case should not be remanded for further findings on that question for the reason that the petition does not contain allegations setting forth fraud or bad faith.

II.

The award as compensation for lost time.

The Court of Claims awarded a recovery in the sum of $7,718.30 as compensation for a loss sustained by the contractor by reason of delays.

On this claim the court made the following finding:

> From June 25 to October 19, 1897, the defendants insisted upon locating for the plaintiffs the points where dredging was to be done, and the plaintiffs were compelled to wait upon the defendants for instructions before they could proceed with their dredging. As a result, the plaintiffs being without authority to continue the work, lost time while waiting for the defendants to locate their work. The time lost during this period, from June 25 to October 19, 1897, was 385 hours and 55 minutes, and the time so lost caused a loss to the plaintiffs of $7,718.30.

Under the specifications covering the work it was provided that "the order of the work will be determined by the United States agent in charge, and his instructions shall be observed by the contractor and his employees." (Rec. 10.)

There was no breach of the contract, therefore, arising from the proper exercise of the right of locating the points where dredging was to be done.

The officer in charge was entitled to a reasonable time under the circumstances for locating the points where dredging was to be done. The only theory upon which the recovery of this item could be allowed is that of unreasonable delay in locating such points by the officer in charge.

But the Court of Claims has not found that there was an unreasonable delay in locating the points or that in the exercise of the right to locate such points the officer in charge was guilty of fraud or bad faith.

It is contended, therefore, that the facts as found by the Court of Claims are not sufficient to justify an award as compensation for the time alleged to have been lost.

CONCLUSION.

No recovery should have been allowed on the claim for the removal of material not specified in the contract to be removed for the following reasons:

(*a*) The provisions of the contract relating to compensation for extra work performed were not complied with.

(*b*) Such provisions of the contract were not waived.

(*c*) There was no breach of warranty necessitating the performance of the extra work.

(*d*) There is no allegation in the petition charging fraud or bad faith and the facts do not establish fraud or bad faith.

No recovery should be allowed on the claim for delays because it does not appear from the facts that such delays were due to a breach of the contract.

It is therefore submitted that the judgment of the Court of Claims should be reversed and the case remanded, with directions to dismiss the petition.

FRANK DAVIS, JR.,
Assistant Attorney General.

WILFRED HEARN,
Special Assistant to the Attorney General.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES, APPELLANT,
v.
L. P. & J. A. SMITH.
No. 253.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

The question of a breach of warranty as the basis of this claim was not discussed in the Government's opening brief for the reason that no such contention was made by appellee either in the petition, the findings of fact and opinion of the lower court, or the brief on behalf of appellee on appellant's motion to remand the case for additional findings of fact, extracts from which appear in the brief on behalf of appellant heretofore filed.

The recovery allowed by the Court of Claims was for work not required by the contract, but which claimant was compelled to perform by the arbitrary action of an agent of the United States. It is stated in the opinion of the Court of Claims:

> The plaintiffs in this case had a contract with the Government whereby they agreed to

> move from a ship channel certain material, which was specifically set forth and described in the specifications attached to the petition. The defendants over the protests of the plaintiffs required them to excavate and remove material which was not included in the contract. The defendants insisted in the face of incontrovertible evidence that the material which they required the plaintiffs to excavate and remove was the material described in the specifications, and stated to the plaintiffs that if they did not remove it they would be declared defaulting contractors. (Rec., 41.)

It is now contended that revovery was allowed on account of a breach of warranty. This is an absolutely new theory. The petition fails to allege that there was a breach of warranty regarding the material to be encountered but on the contrary does allege that the only material the contractor was required to excavate was the material designated in the specifications as sand, gravel, clay, and bowlders. The petition in part says:

> V. In the season of 1894, while working under said contract, toward the northerly end of said eighth section, your petitioner and the defendant discovered a natural bed of limestone rock called "Bar Point Rock Shoal," within the boundaries of the excavation called for by the contract, and which was a material not provided for by said contract to be removed, said contract calling only for the removal of "sand, clay, gravel, and boulders," whereupon a supplementary contract was ordered by the defendant to be entered into for

the removal of said natural limestone bed rock * * *." (Rec. p. 2.)

VI. On the completion of said contract above set forth, your petitioner resumed work under the first contract, above described, at such points as the defendant from time to time directed, and excavated and removed "sand, clay, gravel, and boulders" until in the year 1897, when the defendant, through Geo. J. Lydecker, Lieut. Col., Corps of Engineers, U. S. Army, who had succeeded Colonel O. M. Poe on his death in 1896, and was in charge of said work for the defendant, ordered your petitioner to work at other certain particular points toward the northerly end of said section eight, on what was known as other rock shoals, known respectively as Upper Rock Shoal, Middle Rock Shoal, and Hackett's Rock Shoal, which said shoals were not known to exist by either your petitioner or the defendant at the time the contracts above named were entered into, and also to do additional work on Bar Point Rock Shoal, excavated under the said second contract above set forth, that there existed at these points none of the material specified to be removed under the contract of December 31, 1892, above set forth, but the material to be excavated and removed therefrom was limestone bed rock. (Rec. p. 3.)

It is clear, therefore, that the parties to the contract did not look upon the specifications regarding the material as a warranty, but that the specifications in that regard determined and fixed the scope of the work undertaken by the contractor.

The attention of the court is invited to the language of the third paragraph of the articles of agreement, being in the following words and figures:

> That the said L. P. and J. A. Smith shall furnish all labor, materials, and appliances, *and shall excavate and remove the material, etc., as specified,* for the width of 800 feet, for a ship channel 20 and 21 feet deep between Chicago, Duluth, and Buffalo, located in the eighth section, mouth of the Detroit River, and shall receive in full compensation therefor at the rate of eighteen cents (18) per cubic yard of excavation, scow measure. [Italics ours.] (Rec., p. 22.)

Under the head "Section 8" of the specifications it is stated (Rec., p. 18):

> 90. *Character of Work.—This work to be done consists in excavating a channel within the side and end lines prescribed by the U. S. agent in charge;* said channel to have a minimum width at bottom of 300 feet and a length of about 26,500 feet, but the engineer officer in charge may require the bottom width to be increased to not more than 800 feet, if the price bid so warrants. * * *
>
> 91. *Material.—The material to be removed consists of clay, sand, gravel, and bowlders, all in unknown proportions.*
>
> 92. *Depth of excavation.—The bottom of the completed cut shall be in the plane prescribed by the U. S. agent in charge; the face of excavation probably varying from scraping to 4 feet.* [Italics ours.]

The proposal of the contractor contains the following language (Rec., pp. 18 19):

> In accordance with your advertisement of November 9, 1892, inviting proposals for excavation, etc., *for ship channel 20 and 21* feet deep between Chicago, Duluth, and Buffalo, and subject to all of the conditions and requirements thereof, and of your instructions and specifications, dated November 9, 1892, copies of all of which are hereto attached, and, so far as they relate to this proposal, are made a part of it.
>
> We (or) I propose to furnish all labor, materials, and appliances, *and to excavate and* remove the material, etc., *as specified, at the following price.* * * *
>
> Eighth section: *For all material above* a 21-foot grade, removed and *deposited as specified*, for the sum of eighteen cents (18 cts.) per cubic yard of excavation, scow measure. [Italics ours.]

The advertisement invited a proposal of the contractor to excavate material specified as sand, gravel, clay, and boulders, and the proposal as made by the contractor was "to furnish all labor, materials, and appliances, and to excavate and remove the material, etc., as specified."

The attention of the court is especially invited to the significance of the provisions of the specifications relating to section 8, as follows:

> 91. *Material.—The material to be removed consists of clay, sand, gravel, and boulders, all unknown proportions.*

> 92. *Depth of excavation.—The bottom of the completed cut shall be in the plane prescribed by the U. S. agent in charge; the face of excavation probably varying from scraping to 4 feet.* [Italics ours.]

It will be observed that the contractors did not obligate themselves to excavate all material to a depth of 21 feet or to any definite depth, but rather to excavate sand, gravel, clay, and boulders to a depth prescribed by the United States agent in charge.

The general intent of the improvement was to procure a channel 20 and 21 feet deep. Such intent was expressed by the introductory paragraph of the general advertisement for bids on the eight sections of the improvement. Notwithstanding the general purpose of the contract the contractor here only undertook to remove specified materials.

It appears that in the specifications applicable to sections one, two, three, four, and five, a definite depth of excavation is required. As applicable to section (1) the specification in regard to depth of excavation is as follows:

> 46. *Depth of excavation.*—The bottom of the completed cut shall be in a plane 25.32 feet below the upper surface of the coping of the lock of 1881 in St. Mary's Falls Canal, the face of excavation probably varying from scraping to 5 feet. (Rec. p. 13.)

On page 24 of the brief on behalf of appellee is set out paragraph 42 of the specifications applicable to the contract of 1894 (not the contract involved here) wherein it is required that the excavation shall

be made to a clear depth of 21 feet. By reference to the contract of 1894 it will be observed that it contains the following provision:

> 42. *Character of work.*—The work to be done consists in excavating a channel about 800 feet in length and 400 feet in width to a clear depth of 21 feet below the datum plane established for section 8, ship channel. The estimated excavation above the 21-foot plane is 5,000 cubic yards of bedrock, bank measure, and about 267 cubic yards, scow measure, of material other than bedrock. The estimated amount of bedrock, bank measure, between the 21 and 22 foot planes is 6,202 cubic yards.

It is very evident, therefore, that it was not intended by the contract of 1892 that the contractor should excavate to the depth of 21 feet regardless of material encountered. Under the proper construction of the contract it was not necessary for the contractor to remove any other material than material known as sand, clay, gravel, and boulders, in order to fully perform the contract. Consequently, there was no warranty regarding character of material.

Clearly the contract was to "excavate and remove the material, etc., *specified* * * * for a ship channel * * * and shall receive in full compensation therefor at the rate of eighteen cents (18¢) per cubic yard of excavation, scow measure." The material was specified by sec. 91, as follows:

> *Material.*—The material to be removed consists of clay, sand, gravel, and boulders, all in unknown proportions. (Rec. p. 18.)

There is no question of warranty—the contract called for the removal of clay, sand, gravel, and boulders, nothing else. The contingency of some other material being encountered which had to be removed, was provided for by the following stipulations of the contract (Rec. p. 23):

> If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quality, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: *Provided*, That no payment shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.
>
> No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra

> work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

That this was well understood by the parties is shown by what actually occurred (quoting Finding V, Rec. p. 39):

> Among the specifications for said contract was paragraph 91, which read as follows: "Material: The material to be removed consists of clay, sand, gravel, and boulders, all in unknown proportions." In the season of 1894 the plaintiffs and defendants discovered a natural bed of limestone rock toward the northerly end of section 8, which was within the boundaries of the excavation called for by the contract, and this rock was a material which was not provided to be removed by the terms of the contract. Whereupon the defendants advertised for bids for the removal of this limestone rock from section 8 of the aforesaid ship channel. The L. P. and J. A. Smith Company, a corporation organized under the laws of the State of Ohio, submitted a bid on said work, which bid was accepted by the defendants, and a contract in writing was entered into by the said corporation with the defendants through Col. O. M. Poe, United States Army, whereby the said corporation agreed to remove said rock and other material at the price of $2.24 per cubic yard of excavation, bank measure. The said corporation

> completed the contract aforesaid on or about June 16, 1895. A copy of said contract and specifications are attached to the petition marked "Exhibit B."

After this second contract was completed, work under the original contract was resumed. (Petition, Paragraph VI; Rec. p. 3.)

If, as the findings recite, rock excavation was again necessary, the procedure provided by the contract should have been followed; and, if the Engineer officer in charge arbitrarily refused to recognize rock as rock and called it sand, clay, gravel, or boulders, and insisted that claimant continue to remove the same at the price of 18 cents per cubic yard, the claimant should have appealed to the Chief of Engineers; or he could have refused to proceed with the work as did Spearin. (*United States* v. *Spearin*, 246 U. S. 132.) Having done neither of these things he rests his right to recover on the arbitrary action and coercion of a subordinate officer of the United States, who, by the terms of the contract, had no authority to bind the Government for extra work, and for whose unlawful or unauthorized acts the Government is not liable.

For the reasons stated the cases of *Hollerback* v. *U. S.*, 223 U. S. 165; *Christie* v. *U. S.*, 237 U. S. 234; *U. S.* v. *Spearin*, 248 U. S. 132, and *U. S.* v. *Atlantic Dredging Co.*, U. S. 253, 1, relied upon by appellee, are not controlling in the present case.

If the court should hold that under the terms of the contract the contractor was obligated to excavate

the channel to a definite depth, regardless of material encountered, and that there was a warranty that the material would consist only of sand, clay, gravel, and boulders, even then the question of a breach of warranty depends upon whether as a matter of fact other material than the material specified was encountered and excavated.

Under the terms of the contract the decision of the engineer's officer in charge as to quality and quantity was final. The Court of Claims has found that the material claimed to be bed rock and limestone rock was classified by the engineer's officer in charge as the material specified in the contract, viz: Sand, clay, gravel, and boulders. Unless, therefore, there was bad faith exercised by the engineer's officer in charge in passing judgment upon the character of material his judgment will not be revised. The Court of Claims did not find as a fact that the United States agent in charge, who was authorized by the terms of the contract to pass final judgment on the quality and quantity of material, had been guilty of fraud or bad faith in the exercise of such power; or that his actions amounted to that. The only finding as to this is in the first sentence of Finding VI:

> A large part of the material which the engineer officer in charge arbitrarily stated to be clay, gravel, sand, and boulders, was in fact limestone rock, etc.

The opinion has no place in the findings; it does not in any way show fraud, but rather makes out a case of coercion. The only finding in the case is that

the action of the engineer officer in charge was arbitrary; and, from the findings, this may be, more properly, attributed to ignorance or error of judgment than to fraud. In fact, fraud can not be inferred unless facts are shown from which no other inference can follow.

In the brief filed on behalf of the appellee counsel undertakes to quote, from the Standard Dictionary, the definition of the word "arbitrary." The quotation, however, does not include the complete definition as given. The court will observe that the correct definition is as follows:

> ARBITRARY: Fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things; non-rational; not done or acting according to reason or judgment; *depending on the will alone; absolute in power;* capricious; tyrannical despotic. [Italics ours.]

In the case of *First Savings & Trust Company* v. *Milwaukee County*, 158 Wis. 207, at page 238, Judge Barnes, speaking for the Supreme Court of Wisconsin on the identical question here involved, says:

> The lawful right which the contractor had was to recover the damages which it sustained by reason of acts done by the engineer fraudulently, in bad faith, or through inexcusable ignorance. As to any orders made in good faith upon matters where there was reasonable ground for the exercise of discretion and in reference to which engineers might honestly differ, the decision of the engineer was binding

and there was no lawful right to redress on the part of the contractor for such orders. We are in doubt as to whether the discussion of this subject is particularly helpful in this case. There are some orders given by the engineer which resulted in extra expense to the contractor and in reference to which it would appear to be a close question on the evidence as to whether the engineer was guilty of anything more than an honest mistake or error in judgment. The court, in making its findings with reference to these items, recited that the orders were arbitrary and unreasonable and without justification or excuse. We are at a loss to know whether the trial court treated every order which he deemed to be an improper order as falling within the category of those described in the findings as being arbitrary. To say that a thing has been done arbitrarily is not necessarily the equivalent of saying that it was done in bad faith or through ignorance or incompetency. The words "without justification or excuse" approach more nearly to finding bad faith, but they are not always used to indicate bad faith. In the light of hindsight we sometimes speak of acts as being unjustifiable or inexcusable in reference to which reasonable minds might differ when they are exercising foresight only.

If, as claimed, the engineer officer in charge, did deliberately, through fraud, call limestone bedrock, sand, gravel, or bowlders, and by threats coerce claimant into removing the same, then his conduct

was clearly tortious, and was of that character for which the Government expressly disclaims liability.

Respectfully submitted.

FRANK DAVIS, JR.,
Special Assistant to the Attorney General.

WILFRED HEARN,
Attorney.

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In the Supreme Court of the United States

OCTOBER TERM, 1920.

No. 253.

UNITED STATES OF AMERICA,
Appellant,

vs.

L. P. and J. A. SMITH,
Appellee.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLEE.

STATEMENT OF THE CASE.

This suit was instituted in the Court of Claims by the Appellee, L. P. and J. A. Smith, against the United States to recover losses sustained by the Appellee (the Claimant below), under a certain contract between the Government and the Appellee for the dredging of a channel in the Detroit River below the City of Detroit, a part of the claim being compensation for loss arising on account of breach of warranty by the government in the specifications and contract and part for loss due to enforced delays in the performance of the work.

As set forth in the petition and substantiated by the findings of the Court of Claims, it appears that the claimants, who were partners doing business under the firm name of L. P. and J. A. Smith, in December 1892 entered into a contract with the United States Government for the excavation of a section of a ship channel, covered by certain appropriating legislation, designated as Section 8 and located at the mouth of the Detroit River. The specifications referred to in the advertisement, and which specifications were attached to and made a part of the contract, described the material to be removed as "sand, clay, gravel and boulders, all in unknown proportions." A copy of the contract and specifications, which were attached to the petition as Exhibit "A", appear at Record pages 6 to 24, certain material provisions of which are later more particularly referred to.

Claimants entered into performance of the work embraced in the contract and carried on the same as directed by Colonel Poe, United States Engineer, officer in charge, when in the season of 1894, while engaged in the work toward the northerly end of Section 8, a natural bed of limestone rock, referred to in the findings as "Bar Point Rock Shoal," was discovered within the boundaries of the excavation called for by the contract and the existence of which was unknown to the parties at the time the contract was entered into.

Upon the discovery of this rock shoal, Colonel Poe, the engineer officer in charge, advertised inviting proposals for its removal and The L. P. and J. A. Smith Company, a corporation which the partners had organized, submitted proposals for the work, and its proposal being accepted, a contract for the work was entered into, dated November 9, 1894. Work under this contract

was carried on and completed and final payment made July 11, 1895. A copy of this contract, which was also attached to claimant's petition, marked Exhibit "B," appears commencing at page 25 of the Record.

On the completion of this last named contract by the Smith corporation the claimants resumed work under the first contract and proceeded thereunder as directed until in the year 1897, when the government through Lieut. Col. Geo. J. Lydecker, Corps of Engineers, United States Army, who on the death of Colonel Poe in 1896 had succeeded the latter as the engineer officer in charge of the work, ordered the claimants to work at other certain particular points on the northerly end of said Section 8 on the Rock Shoals known as "Upper Rock Shoal," "Middle Rock Shoal," "Hackett's Rock Shoal," as well as on "Bar Point Rock Shoal," where work had been done under the second contract above referred to, none of which rock shoals were known to exist by either the claimants or government at the time the first contract was entered into.

The material to be excavated at these points was not that specified under the contract of December 31, 1892, viz: clay, sand, gravel and boulders, but was largely limestone bedrock. Claimants protested against being compelled to excavate and remove this material and demanded of the government that an extra price be fixed therefor, but this request was refused and claimants were ordered by Colonel Lydecker to dredge on the various rock shoals above named and excavate the channel to the required depth, the officer stating to them that, should they fail to proceed with the work of excavation as so directed, he would declare them to be defaulting contractors and proceed to have the work done and expense charged to the claimants, paying for it from the

retained percentages in the government's hands due the claimants for work already performed under the contract, and that, if the retained percentages were not sufficient to pay for the work the claimants and their bondsmen would be proceeded against.

The claimants, under protest and under threat of being declared defaulting contractors, as above stated, proceeded with the work as directed and in so doing excavated a large amount of limestone rock and bedrock, the detail with respect to which is set forth in the Findings of Fact, and later instituted this action in the Court of Claims for the loss sustained by it in the excavation and removal of the rock, together with a further claim for loss and damage sustained by reason of delays and suspensions in the work caused by the government.

Although the greater part of the material which was excavated at these shoals was limestone rock and bedrock, it was arbitrarily classified by the engineer officer in charge as being sand, clay, gravel and boulders, this arbitrary classification being made in the face of incontrovertible evidence that the material in question was in fact limestone rock and bedrock.

The case was argued and submitted in the Court of Claims, which, on April 14, 1919, on the facts as found by it and set forth in the Findings of Fact, rendered judgment in favor of the appellee, the claimants below, the court finding claimants to be entitled to $111,585.97 as compensation for damages and loss sustained by reason of the breach of warranty and misrepresentation in the specifications and the contract, and $7718.30 as damages occasioned by the enforced delays in the suspension of work, making a total of $119,304.27, for which judgment was rendered. Motion for new trial was duly filed and overruled and this appeal is now prosecuted by the United States from said judgment.

The Court of Claims in its Findings of Fact has so well stated the case that it seems unnecessary to make any further statement, except as comment upon and some further discussion of the facts is later made in the argument. There are, however, certain parts of the contract and advertisement which we may wish to refer to in the argument and we, therefore, desire to call the Court's attention to the following provisions in the contract and specifications.

THE CONTRACT.

The contract with the government, dated December 31, 1892, which together with the advertisement and specifications referred to therein and made a part of the contract is attached to the petition as Exhibit "A," providing, quoting the language of the contract, (Record, pgs. 21-22):

> "This agreement witnesseth that, in conformity with the advertisement and specification hereunto attached, and which form a part of this contract, the said Colonel O. M. Poe, for and in behalf of the United States of America, and the said L. P. & J. A. Smith for themselves, their heirs, executors and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows:
>
> That the said L. P. & J. A. Smith shall furnish all labor, materials, and appliances, and shall excavate and remove the material, etc., as specified, for the width of 800 feet, for a ship channel 20 and 21 feet deep between Chicago, Duluth and Buffalo, located in the eighth section, mouth of Detroit River, and shall receive in full compensation therefor at the rate of eighteen cents (18) cubic yard for excavation, scow measure.

All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as does not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

The said L. P. and J. A. Smith shall commence and complete the work as specified."

It further provided in part as follows (Record, p. 23):

"It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentages retained, shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sum may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same.

Payments shall be made to the said L. P. & J. A. Smith, as specified when the work contracted for shall have been delivered and accepted, reserving ten per cent from each payment until the whole work shall have been so delivered and accepted."

The advertisement on behalf of the United States inviting proposals for the work recited that—

"Sealed proposals for furnishing all labor, materials and appliances, and excavating a ship channel 20 and 21 feet deep between Chicago, Duluth and Buffalo, will be received at this office until 2 P. M., standard time, on the following dates, and then publicly opened:

* * * * * * * *

For eighth section, mouth of Detroit River, on December 13, 1892.

* * * * * * * *

Specifications, blank forms, and all available information will be furnished on application to this office." (Record, p. 6).

The specifications referred to provided in part:

"29. A copy of this advertisement, specifications, and instructions will be attached to the contract and form a part of it." (Record, p. 9).

"33. The decision of the engineer officer in charge as to quality and quantity shall be final." (Record, p. 9).

"35. * * * Whenever in the specifications 'depth of water' is used, it shall be understood as referred to a water surface 21 feet above the prescribed bottom plane for the first, second, third, fourth, fifth and eighth sections, and 20 feet above the prescribed bottom plane for the sixth and seventh sections." (Record, p. 10).

"37. Inspection.—The order of the work will be determined by the United States agent in charge, and his instructions shall be observed by the contractor and his employees." (Record, p. 10).

"89. Location—This section comprises the improvement of the bar at the mouth of Detroit River.

90. Character of work—*This work to be done consists in excavating a channel within the side and end lines prescribed by the U. S. agent in charge; said channel to have a minimum width at bottom of 300 feet and a length of about 26,500 feet,* but the engineer officer in charge may require the bottom width to be increased to not more than 800 feet, if the price bid so warrants; the estimated excavation for the width of 300 feet being 411,000 cubic yards, scow measure, more or less, and for the width of 800 feet, 1,086,000 cubic yards, scow measure, more

or less. The greatest distance to the dumping ground will not exceed three miles, and the average distance will not exceed two miles.

91. Material—*The material to be removed consists of clay, sand, gravel and boulders, all in unknown proportions.*

92. Depth of excavation—The bottom of the completed cut shall be in the plane prescribed by the U. S. agent in charge; the face of excavation probably varying from scraping to 4 feet." (Record, p. 18).

(The italics in the above quotations from the specifications are ours).

FINDINGS OF FACT.

The Findings of Fact of the Court of Claims are not long and for the convenience of this Court they are here set forth in full, together with the conclusions of law and memorandum opinion filed in connection therewith. (Record, pages 38-41).

Findings of Fact.

I.

"The plaintiffs were at all the times herein mentioned a partnership composed of Louis P. Smith and James A. Smith, doing business under the name of L. P. and J. A. Smith Company. They are citizens of the United States and reside in the city of Cleveland, in the State of Ohio, where was their principal offices, and they have at all times borne true faith and allegiance to the Government of the United States, and have not in any way aided or abetted rebellion against the said Government.

II.

In response to advertisements on behalf of the defendants inviting proposals for furnishing all labor, material and appliances and excavating a ship channel 20 and 21 feet deep the plaintiffs submitted proposals for said work on section 8, which section was at the mouth of the Detroit River, and which section was a part and parcel of the channel appropriated for by the act of Congress of July 13, 1892, known as the river and harbor act.

III.

On December 31, 1892, a contract in writing was entered into by O. M. Poe, Colonel, Corps of Engineers, United States Army, and the plaintiffs, whereby the plaintiffs agreed to excavate a ship channel 20 and 21 feet deep, located in section 8, mouth of Detroit River, in accordance with the specifications attached to said contract, and which were a part thereof, and the plaintiffs were to receive in full compensation for their work 18 cents per cubic yard of excavation, scow measure. A copy of the contract and specifications are attached to the petition, marked 'Exhibit A.'

IV.

The foregoing contract was duly approved by the Chief Engineers United States Army on January 19, 1893, and the plaintiffs in pursuance of said agreement proceeded to execute and carry out the provisions of the said contract, and on October 19, 1897, the plaintiffs were ordered to cease dredging on section 8, and were notified on that day that their contract was completed.

V.

Among the specifications for said contract was paragraph 91, which read as follows: 'Material: The material to be removed consists of clay, sand,

gravel and bounders, all in unknown proportions.' In the season of 1894 the plaintiffs and defendants discovered a natural bed of limestone rock toward the northerly end of section 8, which was within the boundaries of the excavation called for by the contract, and this rock was a material which was not provided to be removed by the terms of the contract. Whereupon the defendants advertised for bids for the removal of this limestone rock from section 8 of the aforesaid ship channel. The L. P. and J. A. Smith Company, a corporation organized under the laws of the State of Ohio, submitted a bid on said work, which bid was accepted by the defendants, and a contract in writing was entered into by the said corporation with the defendants through Col. O. M. Poe, United States Army, whereby the said corporation agreed to remove said rock and other material at the price of $2.24 per cubic yard of excavation, bank measure. The said corporation completed the contract aforesaid on or about June 16, 1895. A copy of said contract and specifications are attached to the petition marked 'Exhibit B.'

VI.

On February 10, 1897, the plaintiffs were informed by Col. Lydecker, Corps of Engineers, United States Army, who was then in charge of the work being done by the plaintiffs under the contract of December 31, 1892, that their contract was extended to July 1, 1897, and was extended from time to time by the defendants for the completion of the work. In that year Col. Lydecker ordered the plaintiffs to work at particular spots toward the northerly end of section 8, or what was known, respectively, as Upper Rock Shoal, Middle Rock Shoal, Hackett Rock Shoal, Lower Rock Shoal, and to do work on the Bar Point Rock Shoal, which had been excavated under the contract of November 9, 1894, with the L. P. and J. A. Smith Company. The material or a large part of the material to be removed from these

points was limestone rock and limestone bedrock. The plaintiffs protested against excavating and removing limestone rock and limestone bedrock, and asked for the fixing of an extra price for doing this work. The defendants refused to fix any other price than that called for by the contract. The defendants insisted that all the material to be removed from the points above enumerated was clay, sand, gravel, and bowlders, and told the plaintiffs that if they did not remove the same the plaintiffs would be declared defaulting contractors; that the work would be taken from them; that the work would be done and the same charged to the plaintiffs; and that it would be paid for from the retained percentages in defendants' hands due the plaintiffs for work already performed under their contract, and if said percentages were not sufficient to pay for the work, the plaintiffs and their bondsmen would be proceeded against.

VII.

A large part of the material which the engineer officer in charge arbitrary stated to be clay, gravel, sand, and bowlders was in fact limestone rock and limestone bedrock, and was not the material which was specified in the contract, and which the plaintiffs had to remove under the terms of the contract.

The quantity of material excavated by the plaintiffs from June 25, 1897, to October 17, 1897, was 33,332 cubic yards, 10 per cent of which was clay, sand, gravel, and bowlders, leaving 29,998 cubic yards of limestone bedrock. From this latter quantity there is to be deducted 1,250 cubic yards, the amount excavated below grade, leaving 28,748 cubic yards of limestone rock and limestone bedrock. Of this latter quantity about 12,990 cubic yards was limestone bedrock and 15,758 cubic yards was limestone rock.

A reasonable price for removing the 12,990 cubic yards of limestone bedrock was $6.22\frac{1}{2}$ per cubic

yard, which would amount to the sum of $80,862.75. A reasonable price for removing the 15,758 cubic yards of limestone rock was $2.24 per cubic yard, which would amount to $35,297.92. These two sums amount to the sum of $116,160.67. The contract price for removing clay, sand, gravel and bowlders was 18 cents per cubic yard; 3,333 cubic yards of this material at 18 cents added to $116,160.67 makes the sum of $116,760.61. From this sum must be deducted the sum of $5,174.64, being the 18 cents per cubic yard paid the plaintiffs on the 28,748 cubic yards removed by them from June 25, 1897, to October 19, 1897, leaving due the plaintiffs by the defendants the sum of $111,585.97, which sum remains unpaid.

VIII.

From June 25 to October 19, 1897, the defendants insisted upon locating for the plaintiffs the points where dredging was to be done, and the plaintiffs were compelled to wait upon the defendants for instructions before they could proceed with their dredging. As a result, the plaintiffs being without authority to continue the work, lost time while waiting for the defendants to locate their work. The time lost during this period, from June 25 to October 19, 1897, was 385 hours and 55 minutes, and the time so lost caused a loss to the plaintiffs of $7,718.30.

Conclusions of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiffs are entitled to recover the sum of $111,585.97 set out in Finding VII and the sum of $7,718.30 set out in Finding VIII. It is therefore adjudged and ordered by the court that the plaintiff recover of and from the United States the sum of One hundred and nineteen thousand three hundred and four dollars and twenty-seven cents ($119,304.27).

Memorandum.

The plaintiffs in this case had a contract with the Government whereby they agreed to move from a ship channel certain material, which was specifically set forth and described in the specifications attached to the petition. The defendants over the protests of the plaintiffs required them to excavate and remove material which was not included in the contract. The defendants insisted in the face of incontrovertible evidence that the material which they required the plaintiffs to excavate and remove was the material described in the specifications, and stated to the plaintiffs that if they did not remove it they would be declared defaulting contractors; that the work would be taken from them, and would be done and charged to them, and paid for from the retained percentages due the plaintiffs for work already performed, and that if these percentages were not enough to pay for the work, the plaintiffs and their bondsmen would be proceeded against. Under these circumstances the plaintiffs excavated and removed the material, which the evidence in this case plainly shows was not the material described and specified in the contract and specifications. We think the right of the plaintiffs to recover the price for the work done by them is undisputable."

ADDITIONAL FINDINGS.

The additional findings of fact made in pursuance to the order of this Court, do not change the facts in the case set forth in the original findings but merely name specifically Col. Lydecker and certain other Government agents as giving certain orders and directions in some instances where the original findings stated the action to have been that of the defendant itself. These additional findings are set forth in full at page 10 of the Appellant's Brief.

ARGUMENT.

The points relied upon by appellant in this appeal are set forth in the summary designated as Brief of Argument, appearing on page 11 of appellant's brief. These points are five in number and are subsequently treated in the brief under separate headings. We will take them up in the order of their discussion there.

I. This suit is not based on a claim for extra work within the meaning of the provisions of the contract requiring such extra work to be covered by special agreement in writing approved by the Chief of Engineers.

It is claimed by Appellant in points 1 and 2 in the Brief of Argument so-called that "The work performed, for which an allowance of $111,585.97 was made, was not provided for or required by the terms of the contract but was extra and outside of the contract," and that "no obligation to pay for extra work was created because the provisions of the contract relating to the procurement of, and the payment for, extra work were not complied with, and that there was not a waiver of such provision."

This, we submit, is an entirely erroneous conception of the theory of the case. The contract provided for the excavation of a ship channel which in section 8, the section covered by the contract, was to be 21 feet deep with a minimum width at the bottom of 300 feet and 26,500 feet in length, to be compensated for by the government at the rate of eighteen cents per cubic yard of excavation. The material to be removed, as set forth in the specifications upon which the contract was let and which, by its terms, became a part of it, was stated as consisting of *"Clay, sand, gravel and boulders, all in unknown proportions."* (Record, p. 18).

During the progress of the work certain rock shoals were discovered within the section of the channel covered by the contract, the existence of which were unknown to the parties when the contract was entered into. The excavation of the ship channel to the specified depth required at these points the removal of limestone rock and limestone bedrock, which would involve greatly increased expense as compared with the dredging of clay, sand, gravel and boulders. When this discovery was made the claimants protested against excavating and removing limestone rock and limestone bedrock and requested of the government that an extra price be fixed for doing this work.

If an agreement had been reached with respect to this and the claimants had voluntarily proceeded with the work on the rock shoals, relying upon some understanding had with the engineer officer or his subordinates as to receiving an extra price for such work and without having such understanding reduced to writing and approved by the Chief of Engineers, the case would then come under the rule relied on by the appellant and no recovery could be had by reason of failure to comply with the provisions of the contract with respect to such claims for extra work. This, however, is not what happened here, the Court of Claims finding specifically on this point as follows:

> "The plaintiffs protested against excavating and removing limestone rock and limestone bedrock and asked for the fixing of an extra price for doing this work. *The defendant refused to fix any other price than that called for by the contract.*" (Italics ours, Record, p. 40).

Thus we find that upon discovery of the bedrock the claimants protested against being required to excavate it and requested the fixing of an extra price for

doing the work. This was refused by the government. Thereupon, Colonel Lydecker, the engineer officer then in charge who had succeeded Colonel Poe, apparently refusing to recognize the existence of the bedrock or that in any event its existence relieved the claimants from excavating at those points to the full channel depth, insisted that the contractors proceed with such excavation, telling them that if they did not so proceed they would be declared defaulting contractors, the work would be taken from them, be let to others, charged to them and paid for out of the retained percentages and they and their bondsmen proceeded against for any excess cost.

Apparently, in order to appear consistent in so requiring the contractors to proceed with this excavation under the contract and so justify the payment of only eighteen cents per cubic yard for the material removed, Colonel Lydecker, as found by the Court of Claims, arbitrarily classified the material removed as clay, sand, gravel and boulders, when in fact it was for the most part limestone rock and limestone bedrock.

The contractors were faced with the alternative of either proceeding with the work pursuant to the directions of the engineer officer in charge or being declared defaulting contractors and of having the work and their equipment taken away from them, their retained percentages appropriated by the government and they and their bondsmen being subjected to suit for the recovery of the large additional costs which a re-letting of the work would no doubt involve. To have their retained percentages appropriated and their equipment taken from them, with the hazard of protracted litigation, might prove ruinous and they chose the alternative of proceeding with the work under protest, in the expectation of ultimately being able to recover compensation

for the additional work occasioned by the faulty specifications.

In this situation an action for breach of warranty clearly lies and is recognized by many decisions of this Court.

U. S. vs. Utah etc. Stage Co., 199 U. S. 414;
Hollerback vs. U. S., 233 U. S. 165;
Christie vs. U. S., 237 U. S. 234;
U. S. vs. Spearin, 248 U. S. 132;
U. S. vs. Atlantic Dredging Co., 253 U. S. 1.

It would seem unnecessary to review in detail the foregoing cases, each of them being decisive upon the question that where a material representation is made either in the contract or in the specifications, which form a part of the contract, and such representation turns out to be untrue and being deceptive and misleading to the bidder who enters into the contract, the contractor has the right to recover for the loss sustained by him on account of such misrepresentation, such recovery taking the form of an allowance of compensation for the additional work involved.

In *Hollerback vs. United States, supra,* the specifications recited the material to be encountered in connection with a certain part of the work as being "broken stones, sawdust and sediment." A different material was encountered entailing more expensive operations. The Court on pages 171-172 says:

> "A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument. In paragraph 33 the specifications spoke with certainty as to a part of the conditions to be encountered by the claimants. True the claimants might have penetrated the seven feet of soft slushy sediment by means which would

have discovered the log crib work filled with stones which was concealed below, but the specifications assured them of the character of the material, a matter concerning which the Government might be presumed to speak with knowledge and authority. We think this positive statement of the specifications must be taken as true and binding upon the Government, and that upon it rather than upon the claimants must fall the loss resulting from such mistaken representations."

The Court in the *Christie* case above cited, states on page 241:

"There was a deceptive reference of the materials and it misled."

Page 242: "It makes no difference to the legal aspects of the case that the omissions from the records of the result of the borings did not have sinister purpose. There were representations made which were relied upon by the claimants and properly relied upon by them as they were positive * * *."

To the same effect are the other cases above cited, in most of which appears that the contractor proceeded with the work under contract and subsequently made claim for an allowance covering the additional work due to the existence of the conditions different from those specified, and the court allowed recovery therefor.

Appellant admits in its brief (appellant's brief, p. 13) that the provisions of the contract requiring a written agreement covering payment for extra work do not apply—

"(a) When such provisions have been waived by an agent having power to waive the same;

(b) Where there has been a breach of warranty by the government relating to a matter necessary to be done in the performance of the contract by reason of which breach the extra work is required to be performed;

(c) When the extra work is made necessary or procured through the fraud or bad faith of an agent of the government in the exercise of expressly delegated powers."

Concededly, therefore, if this case falls within any of these exceptions, recovery can be had.

For the reasons above stated it appears clear here from the findings of the Court of Claims that there was a breach of warranty by the government relating to a material matter and, if this is true, the appellant's whole contention falls.

With respect to the matter of waiver of an agreement covering the extra work or increased cost involved, we believe that if it were necessary here to rely on such waiver the findings of the Court of Claims disclose facts amounting to such waiver.

It appears that when the contractors discovered the existence of bedrock and the necessity of its removal to accomplish the 21 foot depth they protested against excavating this different material and asked for the fixing of an extra price for doing this work, but that the defendant (namely the United States Government) refused to fix any other price than that called for by the contract (Record, p. 40) and that the engineer officer in charge insisted that the contractors go forward with the work of excavating at these points. The refusal of the government to fix an extra price and its insistence that the contractors go forward without special agreement covering the same seems to us to clearly amount to a waiver of the contract provision concerning the requirement for a special contract. An individual in such case would be estopped by such conduct from claiming that a special agreement should have been made and, if the obligations of the government under its contracts are to be treated as like obligations under contracts between individuals

as stated in the case of *Hollerback vs. United States supra*, we submit that the government is in like manner so estopped.

As to the work being made necessary through the fraud or bad faith of an agent of the government, we submit also that the findings here show such capricious and arbitrary action on the part of the engineer officer in charge as to amount to constructive fraud within the doctrine of the case of *Ripley vs. United States*, 223 U. S. 695, referred to in appellant's brief. This is not an action of tort and no actual fraud or bad faith in the sense of malicious conduct is charged or necessary to be shown, but that the acts of the government's agent were arbitrary and entirely unjustifiable as an exercise of honest discretion is clearly found. We will discuss this phase of the case in later commenting upon appellant's contention in regard to bad faith.

II. Breach of Warranty.

The third point relied upon by appellant in its Brief of Argument is that there was no breach of warranty by the United States relating to a matter material and necessary to the contract. Its discussion of this point is confined to four lines in the brief where it dismisses the whole matter by saying (appellant's brief, p. 14):

> "It does not appear from the facts as found that a breach of warranty on the part of the government made the extra work necessary. The petition does not so allege. Such claim has not been made."

We have already discussed the facts showing such breach of warranty. Certainly the recital in the specifications that the material to be encountered and removed consisted of sand, clay, gravel and boulders was a material representation. The character of material to be encountered in any excavating or dredging operation

is of necessity a material and most important condition as the cost of the operation is almost entirely dependent upon it. So we have here in the specifications a positive statement as to an essential condition of the proposed work which under all of the authorities amounts to a warranty.

The facts of the case show that nearly 90% of the material encountered on these shoals was rock and that 28,748 cubic yards of limestone rock and limestone bedrock were required to be removed and were removed in excavating the channel. That this was a material departure from the specifications and from the representations upon which the contract was let, is self evident. We can hardly see how there could be a clearer case of breach of warranty based upon material representations embodied in a contract, and this is perhaps why appellant has so little to say on the subject in his brief.

It is further said that the petition does not allege a breach of warranty and that no such claim has been made. It is true that the petition in terms does not use the expression "breach of warranty." The petition does, however, state the facts showing such warranty and its breach. It avers the fact that the contract called for the removal only of sand, clay, gravel and boulders, and the specifications, forming part of the contract and which contained this description of the material to be encountered, are attached to the petition as an exhibit. The petition further states that other and different material than that described in the specifications was encountered and that its removal occasioned the loss complained of. This, we submit, is sufficient to sustain a recovery upon the facts as found by the Court of Claims. We will discuss later somewhat more fully the question of the sufficiency of the petition.

III. The Question of Bad Faith.

The fourth point in appellant's brief is that the petition does not allege nor the Court of Claims find that bad faith on the part of an officer of the United States in the exercise of powers conferred upon such officer produced the injury complained of.

It is a misconception of the theory of claimant's action to treat the same as though based upon fraud or bad faith or as involving merely a claim for a mis-classification of the excavated material. Proper analysis of the case shows that a recovery is amply justified on the basis of a breach of warranty within the doctrine of the numerous decisions of this Court hereinbefore cited. The arbitrary and, as we submit, constructively fraudulent action of Colonel Lydecker, the engineer officer in charge, becomes material and is relied upon as justifying claimant's proceeding with the work after discovery of the mistake in the specifications, and further as showing the existence of such mistake.

If Colonel Lydecker's classification of the excavated material as being all clay, sand, gravel and boulders was to be treated as decisive under the clause of the contract providing that "the decision of the engineer officer in charge as to the quality and quantity shall be final," then it might be said that no breach of warranty existed, for the reason that the engineer officer had found that no other or different material had been encountered. The Court of Claims has found as a fact, however, that the material in these rock shoals, where the claimants were required to work, was limestone, 90% of the material there excavated being limestone rock and bedrock and not clay, sand, gravel and boulders; that the engineer officer arbitrarily classified this material as clay, sand, gravel and boulders when it was in fact limestone rock

and bedrock, and in the memorandum accompanying the findings states that this arbitrary action was taken in the face of incontrovertible evidence.

This action of Colonel Lydecker is probably explainable on the theory that he took the view that, if, under the provisions of the contract making his decisions final, he refused to recognize the existence of a different material and required the contractor to go forward without the fixing of an increased price and then classified all material excavated as being material conforming to the specifications, the contractor would be bound thereby and be precluded from making any claim for damages and the contractor be thus made to sustain the additional cost which otherwise would fall on the government. His action in this respect, though perhaps without malice or bad faith in the tortious sense, was so arbitrary, unreasonable and unwarranted as to be constructively fraudulent and was certainly an improper exercise of the discretion vested in him under the contract.

In this connection the facts with respect to what took place when a rock shoal was first discovered in the season of 1894 is important. At that time Colonel O. M. Poe was the engineer in charge of the work, being the officer under whom the original specifications had been drawn up and the work let. When this first rock shoal was discovered by the contractor and the government, Colonel Poe, recognizing that such rock excavation was not contemplated by the contract, let a new contract covering the shoal, fixing a price of $2.24 per cubic yard for all material excavated in lieu of the original contract price of 18¢ for the other material. The advertisement for bids for this work showed that the government recognized the existence of bedrock, the character of the work being described in the specifications contained in

the advertisement, as follows (see Exhibit B, Record p. 25, at page 30):

> "42. Character of work—The work to be done consists in excavating a channel about 800 feet in length and 400 feet in width to a clear depth of 21 feet below the datum plane established for section 8, ship channel. *The estimated excavation above the 21 foot plane is 5000 cubic yards, of bed rock, bank measure, and about 267 cubic yards, scow measure, of material other than bed rock.* The estimated amount of bed rock, bank measure, between the 21 and 22 foot planes is 6,202 cubic yards." (Italics ours).

This contract was let to The L. P. & J. A. Smith Company, a corporation which had been organized by the partners who had undertaken the original contract. This contract, which was entered into in October 1894, was completed in June 1895, and the contractors under the contract of December 1892 thereupon continued work under due extensions of time under said original contract. At this time Colonel Lydecker had succeeded Colonel Poe who had died in 1896 and as the United States Engineer Officer assumed full charge of the work.

Other rock shoals were discovered and Colonel Lydecker directed the contractors to excavate these shoals as well as to do further work on the Bar Point Shoal, where operations had been conducted under the second contract above referred to. Thereupon arose the protests and requests for the fixing of an increased price for this rock work, which resulted in the refusal of the Government to fix such increase price and the arbitrary action of Colonel Lydecker here complained of.

The facts with respect to this second contract were pleaded and are important only as evidence of the original intention of the parties in making the first contract that this contract was not intended to cover rock

work, and as showing the manner in which the matter was treated by the original engineer officer, under whose supervision the main contract was let, when rock work of this character was encountered.

The Court of Claims has found the facts as above stated and found in express terms that the classification by Colonel Lydecker of the material as clay, sand, gravel and boulders, when it was in fact limestone rock and limestone bedrock, was arbitrarily made and so made in the face of incontrovertible evidence.

The word "arbitrarily" means in an arbitrary manner, and "arbitrary" is defined by the Standard dictionary as follows:

> "Fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; non-rational; not done or acting according to reason or judgment; capriciously, tyrannical; despotic."

We submit that the decision of Colonel Lydecker, exercised capriciously, non-rationally and tyrannically and without adequate determining principle or founded in the nature of things, is not an exercise of discretion within the provision of the contract which provides that the decision of the engineer officer in charge as to quality and quantity shall be final. The insistence of this officer that the contractors proceed with the work on these rock shoals under the original contract and his arbitrary classification of the material excavated as being that specified in the original contract, when 90% of it was in fact bedrock, was not the exercise of an honest judgment in discharging the duties imposed upon him. If it was a mistake, it was so gross a mistake and so gross an abuse of discretion as will imply fraud and bad faith in law.

In the cases where this Court has held the decision of a government officer to be final when final discretion

was vested in him under a contract it has used this language:

> "In the absence of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment, his action in the premises is conclusive upon the appellant as well as upon the government."

Martinsburg & Potomac R. Co. vs. March, 114 U. S. 549, page 551;
Sweeney vs. U. S., 109 U. S. 618;
Kihlberg vs. U. S., 97 U. S. 398.

In the case of *Saalfield vs. United States*, 246 U. S. 610, the Court in discussing a similar provision in the contract under the terms of which certain tests were to be made subject to the satisfaction of certain officers, said:

> "These officers were to decide not arbitrarily, but candidly and reasonably, whether the tests had been made."

and in the case of *Barlow vs. United States*, 184 U. S. 123, cited by the appellant, the court states:

> "The engineer's decision as to quality and quantity is final when properly exercised."

Can it be said that, where the officer has acted arbitrarily under the facts as here disclosed, his discretion has been properly exercised?

In *Ripley vs. United States*, 223 U. S. 695, also cited by appellant, the court in commenting upon a like contract provision "that the decision of the engineer officer in charge as to quality and quantity shall be final" said on *page 701:*

> "That the very extent of the power and conclusive character of his (the engineer officer in charge) decision raised a corresponding duty that the agent's judgment should be exercised, not ca-

priciously and fraudulently, but reasonably and with due regard to both the contracting parties."

It would be a very strained construction of the law and the contract, a contract framed too by the United States, to construe the power of decision vested in the engineer as the reservation of the right to arbitrarily classify materials regardless of facts and to arbitrarily compel the contractor, under penalty of forfeiting his contract, to proceed with work not contemplated by the contract and differing entirely from the advertisement and specifications upon which the contract was let.

We submit, therefore, that the basis of recovery here is for breach of warranty on the part of the government in the specifications under which the contract was let and which formed a part of it, and that the conduct of the engineer officer in charge of the work is important only as determining whether the contractor is bound by his arbitrary decision that the materials excavated did in fact conform to the terms of the specifications so that no breach of warranty existed. On this phase of the case we claim that such conduct and the arbitrary classification so made was not the proper exercise of the powers and duties vested in him under the contract.

IV. The award for lost time was properly granted.

The Court of Claims has found that the defendants insisted upon locating for the plaintiffs the points where dredging was to be done, and that the plaintiffs were compelled to wait upon the defendants for instructions before they could proceed with their dredging. As a result the plaintiffs, being without authority to continue the work, lost time while waiting for the defendants to locate their work. The time lost during this period from June 25th to October 19th, 1897, was 385 hours and 55

minutes, and the time so lost caused a loss to the plaintiffs of $7,718.30 (Record, p. 41).

The specifications covering the work which was made a part of the contract provided:

> "The order of the work will be determined by the United States agent in charge, and his instructions shall be observed by the contractor and his employees." (Record, p. 10).

The Court of Claims having found that the defendants compelled the claimants to wait for them a total of 385 hours and 55 minutes from June to October, it must follow that the claimants are entitled to damages by reason of said delays, as it has always been the rule of law of this Court that the United States shall be liable the same as an individual would be for causing these delays or for any interference with the contractor which might cause a delay.

United States vs. Smith, 94 U. S. 214;
United States vs. Mueller, 113 U. S. 153.

Appellant in the fifth point of its Brief of Argument announces the proposition that, in order to base a recovery for damages for lost time the claimant must show the exercise of fraud or bad faith by the officer in charge which occasioned the delays. We do not understand that any such rule obtains or that the rule with respect to enforced delays in government work is any different from that as between individuals. The provision of the specifications above quoted providing that the order of work should be determined by the United States agent in charge, was not intended to cover the matter of delay but merely to empower the officer to direct the places where and the order in which the dredging should be done.

It is of course important in any dredging operation where dredges and men have to be kept continuously at the place of work that the dredging operations be conducted continuously and, if unnecessary delays and suspensions of work were caused by the government, the contractor should be compensated for his loss. The Court of Claims has found that from June 25th to October 19th, 1897, the claimant was compelled to wait for the defendants for instructions before they could proceed with their dredging approximately 386 hours. A simple calculation shows that there are 99 working days from June 25th to October 19th. Calculating twelve working hours to each day, which would be a maximum, we find that there would be a total of 1188 working hours during said interval of time. It is, therefore, evident that the claimant, together with its men, machinery, plant and capital was compelled to lay idle approximately one-third of the entire working season due to the lack of superintendence or the refusal of the agents of the United States to locate the points where the dredging was to be done. If it were necessary to find any unreasonableness in the matter of these enforced delays, the facts themselves as found by the Court of Claims, clearly show it.

V. Technical pleading is unnecessary.

The petition shows in substance that the claimants entered into a contract with the United States for the excavation of a section of the ship channel in the Detroit River under an advertisement and specifications which represented the material to be encountered and removed as being clay, sand, gravel and boulders; that during the progress of the work certain rock shoals were discovered which were unknown to either of the parties at

the time of making the contract and which in the excavation of the channel required the removal of limestone rock and bedrock, a material not covered by the original specifications and contract; that the claimants, upon being directed by the engineer officer in charge to proceed with the excavation at these shoals, protested and demanded that an extra price be fixed for doing the additional work, but were compelled by said officer to proceed with the excavation at these points under threat of being declared defaulting contractors and their retained percentages appropriated; that the material so excavated was in fact in large part bedrock and not the material specified in the contract and that by reason of being so compelled to remove the same claimants suffered large loss, the amount of the loss being stated as the fair market value of excavating limestone bedrock, the figures with respect thereto being set forth in the petition.

The petition further alleges the suffering of damage by reason of loss of time sustained by delays in the work caused by the agents of the government superintending the same, under whose direction the contractors were obliged to work.

These allegations are amply sustained by the findings of fact of the Court of Claims, which findings also show the arbitrary and unjustifiable conduct of the engineer officer in compelling the claimants to proceed with the excavation of this different material under the original contract and his arbitrary misclassification of the material removed.

Inasmuch as pleadings of technical formality are not necessary or requisite in the Court of Claims, the claimant set forth in its petition a plain statement of facts upon which it based its claim so far as known to it at the time of instituting the suit, without technical for-

mality, a proceeding which has been authorized and sanctioned by this Court, as stated in the case of *United States vs. Beham*, 110 U. S. 347, in which case the court states:

> "The particular form of the petition in this case ought not to preclude the claimant from recovering what was fairly shown by the evidence to be the damages sustained by him. * * * In a proceeding like the present, in which the claimant sets forth, by way of petition, a plain statement of the facts without technical formality, and prays relief either in a general manner, or in an alternative or cumulative form, the Court ought not to hold the claimant to strict technical rules of pleading, but should give to his statement a liberal interpretation, and afford him such relief as he may show himself substantially entitled to if within the fair scope of the claim as exhibited by the facts set forth in the petition."

See also *Clark vs. U. S.*, 95 U. S. 539.

The petition in this case contains a plain statement of the claim made and sets forth all of the ultimate facts upon which the recovery herein is based. The defendant in the Court below made no objection to the form of the petition. We respectfully contend that it has universally been held by this Court that forms of pleading do not preclude a claimant from recovering what is justly due it as shown by the evidence, and we, therefore, submit that the petition in this case is entirely sufficient.

CONCLUSION.

The Government made positive and direct representations upon which the claimant had the right to rely as to the material to be dredged. The Court of Claims has found that these representations were untrue and that a large part of the material encountered was other than that described in the specifications. The claimant cannot be bound by the arbitrary classification of the materials by the United States engineer officer in charge, by which classification the engineer officer in charge attempted to classify the materials as conforming to the contract regardless of the facts. This case being one for breach of warranty and the claimant having demanded a new contract and the fixing of an extra price for the material encountered differing from that described in the specifications upon the discovery of this different material and which new contract was refused by the defendant, the provisions of the contract relating to extra work do not apply. This case is not based on fraud or bad faith and there need be no allegation or proof of sinister purpose in the misrepresentations to permit a recovery. As to the claim for losses due to delays in the work the United States is liable for the delays caused the contractor the same as an individual would be. We submit, therefore, that the judgment of the Court of Claims should be affirmed.

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